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IN THE

SUPREME COURT OF THE UNITED STATES

ALLEN SNYDER
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE LOUISIANA SUPREME COURT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

THIS IS A CAPITAL CASE

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REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF *CERTIORARI*

Petitioner, Allen Snyder, respectfully submits this Reply Brief in support of his Petition for Writ of *Certiorari* seeking review of the decision of the Louisiana Supreme Court.

Introduction

This capital case involves a prosecutor who, prior to Mr. Snyder's 1996 trial, made statements to the media comparing Mr. Snyder's case to the O.J. Simpson case; who, during voir dire, peremptorily struck all five qualified African Americans; and, who, during penalty phase argument, urged the all-white jury he had constructed to sentence Mr. Snyder to death because this case was like O.J. Simpson's, where the defendant "got away with it." Both a majority of the Louisiana Supreme Court and now the State have attempted to bleach any indicia of racially discriminatory intent from the prosecutor's O.J. Simpson's public commentary and argument by contending these remarks did not reveal racial animus because the prosecutor did not state the self-evident: that Mr. Snyder and Mr. Simpson are black.[1] *State v. Snyder*, 942 So. 2d 484, 499 (La. 2006) ("*Snyder III*"); State's Brief, at 15. Mr. Snyder's trial took place less than a year after O.J. Simpson's acquittal. It is difficult to imagine that the members of Mr. Snyder's venire would not have been aware of the racially divisive nature of that case.[2]

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[1] Photographs introduced into the record, *see, e.g.*, State Ex. 20, show that Mr. Snyder is a medium-dark complected African American. That O.J. Simpson is African American is a fact of which this Court can take judicial notice.

[2] Other courts have found more benign references to O.J. Simpson than those made in this case to be evidence of discriminatory intent. *See, e.g., Valdez v. People*, 966 P.2d 587, 596 (Colo. 1998) (prosecutor's comments about the O.J. Simpson case amounted to "references to racial bias during voir dire [that] certainly support the defendant's argument that he established a prima facie case under *Batson*."); *Serrano v. Francis*, 345 F.3d 1071, 1083 (9th Cir. 2003) (in civil rights action, defendant's "racially tinged remarks . . . – specifically, that Francis '[didn't] know how black people think' and that he said that 'he was treating [Serrano] like all the rest . . . and that [Serrano] was 'not O.J. Simpson or Johnnie Cochran,'"

While the prosecutor's successful efforts to parlay the guilty verdict into a death sentence by urging Mr. Snyder's jury to rectify O.J. Simpson's acquittal with its penalty verdict constitute the starkest evidence that the prosecutor violated *Batson v. Kentucky*, 476 U.S. 79 (1986), consideration of the entire record substantiates that the prosecutor intentionally struck African-American panelists on the basis of their race. The State's responsive brief, however, avoids this conclusion by ignoring the record below, dismissing probative evidence of the prosecutor's discriminatory intent, and urging blind deference to the trial court's unreasoned rulings.

Mr. Snyder's Petition presents three questions,[3] which the State reduces to a single, reductionist question: "Whether the state courts properly accepted as race-neutral the reasons given by the state for its removal of those prospective jurors for whom a contemporaneous objection was made." State's Brief, at ii. The State's reduction of the issues may lay the groundwork for its conclusory arguments, but it does not address the legal issues presented in this case and casts aside important and relevant record evidence. The State, for instance, appears to suggest that the Louisiana Supreme Court found that Mr. Snyder's claim, "that the prosecutor made numerous statements to the press and public comparing this case to O.J. Simpson, . . . never [was] and [is] not now, part of the record before this court for review.'" State's Brief, at 15 (citing *Snyder III*, 942 So. 2d at 499). This position is unfounded. Prior to trial, the defense filed two motions contesting the prosecutor's

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constituted evidence of discriminatory intent). *See also* Brief of *Amicus Curiae* Cornell Death Penalty Project in Support of Petitioner Allen Snyder, at 8 ("It is impossible to believe that a prosecutor who struck all of the qualified African American venirepersons was unaware that he had an all-white jury before him, or unaware that an all-white jury would respond more sympathetically to the O.J. Simpson analogy.").

[3] These questions are whether the Louisiana Supreme Court (1) misapplied *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*); (2) erroneously applied the highly deferential standard of review used in *Rice v. Collins*, 546 U.S. 333 (2006); and (3) erred in holding that the failure to preserve a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), can never satisfy the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1986).

public references to his "O.J. Simpson case," R. 159-61, 179-80, and, at hearings on the motions, the prosecutor never disavowed these statements, R. 418-19, 477-79.

This Reply Brief will attempt to refocus the issues to those actually raised by the Petition and clarify the record bases for Petitioner's claims.

I.
The State's efforts to distinguish *Miller-El II* are unavailing

As set forth in detail in the Petition, this case is on all fours with *Miller-El II*. Here, the statistical pattern could not be more striking, as the prosecutor used peremptory challenges to remove one hundred percent of the qualified African-American panelists. *Cf. Miller-El II, supra*, 545 U.S., at 240-41. Likewise, careful scrutiny of the prosecutor's proffered race-neutral reasons for striking Jeffrey Brooks and Elaine Scott reveals both that some of the prosecutor's reasons lack record support and that the State accepted similarly situated white prospective jurors. *Cf. id.* at 241-53; *see infra* at 5-14. Finally, "broader patterns of discrimination," including the prosecutor's pretrial comments and inflammatory O.J. Simpson closing argument, and a history of discriminatory strikes by Jefferson Parish prosecutors bolster a finding that the prosecutor in Mr. Snyder's case intentionally removed African-American prospective jurors because of their race. *Cf. id.* at 253-65.

The State, however, essentially ignores this evidence. Like a majority of the Louisiana Supreme Court, the State erased the statistical pattern of peremptory challenges from the *Batson/Miller-El II* analysis in arguing that three of the five strikes cannot be considered. *See* State's Brief, at 2-5.[4] Likewise, the State did not address the record evidence revealing the prosecutor's

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[4] The State argues that the peremptory challenges to Greg Scott and Thomas Hawkins, Jr., are not properly before the Court because trial counsel failed to raise a *Batson* objection to their removal. State's Brief, at 2-3, 4-5. The State additionally contends that the prosecutor's use of a peremptory challenge to remove Loretta Walker is irrelevant because the defense, on appeal, did not present specific arguments

disparate treatment of similarly situated black and white jurors, and the lack of record support for some of the prosecutor's proffered reasons for striking Jeffrey Brooks and Elaine Scott.[5] *See* State's Brief, at 7-10. And, the State (like the lower court majority) sanitized the prosecutor's O.J. Simpson argument and ignored documented proof that prosecutors in Jefferson Parish routinely exercise peremptory challenges to purge African Americans from capital juries.[6]

The State, moreover, contends that because this case did not involve "jury shuffling,"[7] "graphic scripts" or a manual on how to strike minorities from jury pools, *Miller-El II*'s analysis has no bearing here. State's Brief, at 13-15. This argument misses the forest for the trees. Like prospective jurors, judicial cases "are not products of a set of cookie cutters." *Miller-El II, supra,*

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challenging her removal. *Id.* at 3-4, 6. Regardless of whether the *Batson* challenges to these jurors have been preserved, however, it does not follow that the State's removal of Scott, Hawkins and Walker is inconsequential to the *Batson* analysis. In *Miller-El II*, this Court considered probative the prosecutor's pattern of peremptory challenges, despite focusing solely on only two African-American prospective jurors whom the prosecutor had removed for reason the Court found to be pretextual. *See Miller-El II, supra*, 545 U.S., at 252 n.11. *See, e.g., Kesser v. Cambra*, 465 F.3d 351, 369 n.6 (9th Cir. 2006) (en banc)

[5] The State's discussion of the prosecutor's proffered reasons for striking Brooks and Scott focuses on the race-neutrality of those reasons (which Mr. Snyder has not contested). The State fails, however, to address Mr. Snyder's evidence demonstrating that those race-neutral reasons were pretextual. The strikes of these two jurors are discussed in detail at pages 5-14 of this Brief.

[6] *See* Brief of *Amicus Curiae* Cornell Death Penalty Project in Support of Petitioner Allen Snyder, at 3-8 (discussing prosecutor's O.J. Simpson comments and argument); Brief of *Amicus Curiae* Louisiana Association of Criminal Defense Lawyers, at 15-17 (discussing Jefferson Parish pattern of practice in purging juries of African Americans).

[7] The State's effort to distinguish *Miller-El II* on this basis is misplaced. As Justice Johnson pointed out in her dissenting opinion, "Louisiana does not have the 'jury shuffle,' but we do have a practice that can be used in an equally discriminatory fashion. Louisiana allows parties to use peremptory challenges to 'back strike' jurors pursuant to LSA-C.Cr.P. art 795." *Snyder III, supra*, 942 So. 2d at 508 (Johnson, dissenting). Justice Johnson observed that "the prosecutor's action in accepting the first African-American juror [Jeffrey Brooks] seems to have been a tactic to keep defense counsel from raising *Batson* challenges to the subsequent exclusions." *Id.* at 506 (quoting *Snyder I*, 750 So. 2d 832, 866 (La. 1999)). The prosecutor later back struck Brooks, thereby "remov[ing] the only African-American juror the State had accepted for service." *Id.* at 501 (Kimball, J., dissenting).

545 U.S., at 247. When Mr. Snyder's "evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination." *Id.* at 265.

II.

Consideration of the voir dire record alone shows that the prosecutor's race-neutral reasons for striking Jeffrey Brooks and Elaine Scott were pretexts for intentional racial discrimination

A more detailed review of the voir dire than was provided by the State demonstrates the pretextual nature of the prosecutor's proffered race-neutral reasons for removing otherwise qualified prospective jurors.

Jeffrey Brooks: When the State announced its intention to use its seventh peremptory challenge to backstrike Brooks, the fourth consecutive peremptory challenge of an African American, the defense objected and requested a race-neutral reason. The prosecutor responded as follows:

> I will provide three. I thought about it last night. Number 1, the main reason is that he looked very nervous to me throughout the questioning. Number 2, he's one of the fellows that came up at the beginning and said he was going to miss class. He's a student teacher. My main concern is that for that reason, that being he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase. Those are my two reasons.

R. 954. The defense countered the prosecutor's purported reasons, arguing:

> His main problem yesterday was the fact that he didn't know if he would miss some teaching time as a student teacher. The clerk called the school and whoever it was and the Dean said that wouldn't be a problem. He was told that this would go through the weekend, and he expressed that was his only concern, the he didn't have any other problems. As far as him looking nervous, hell, everybody out here looks nervous. I'm nervous.

R. 955-956. The prosecutor reiterated, "Mr. Brooks was very uncertain and very nervous looking," but did not offer any illustration to support his claim. R. 956. Without stating any reasons for its

ruling, the trial court overruled the *Batson* challenge: "All right. I'm going to allow the challenge. I'm going to allow the challenge." R. 956.

Even a perfunctory analysis by the trial court would have revealed that these two (rather than three) articulated reasons by the State – nervousness and being in a rush to return to school – were pre-textual.

Nervousness: The State's allegation of "nervousness" finds no support in the voir dire transcript itself and was promptly rebutted by defense counsel. Certainly, "the record seems to indicate that Mr. Brooks was an engaged and voluble juror throughout voir dire examination." *Snyder III*, *supra*, 942 So. 2d at 502 (Kimball, J., dissenting).[8] Brooks provided thoughtful and well-reasoned responses to each question posed,[9] volunteered cogent information during questioning,[10] and expressed a thoughtful and measured approach to serving as a juror.[11] Unsupported in any manner by the transcript, the prosecutor's claim that Brooks "looked very nervous" was a classic mask for a racially motivated strike; and Brooks' responses are indistinguishable from any other

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[8] Justice Kimball authored the original opinion rejecting Mr. Snyder's *Batson* claims. *See State v. Snyder*, 750 So. 2d 832 (La. 1999) (*Snyder I*).

[9] *See, e.g.*, R. 665 (in response to defense counsel's question about whether he could hold defense counsel's decision to enter an insanity plea against counsel and not Mr. Snyder, Brooks queried, "The final decision is his, isn't it?" – an accurate statement of the law); R. 691 (when asked whether he could accord Mr. Snyder the presumption of innocence, he asked how that fit with the earlier explanation that the defense bore the burden of proving insanity).

[10] *See, e.g.*, R. 704 (when defense counsel asked the panel whether anyone could think of a reason that a defendant might not testify, Brooks immediately suggested that "[h]e may say something to destroy his credibility, by accident.").

[11] *See, e.g.*, R. 682-83 (when asked by defense counsel whether he conceivably could believe the testimony of Mr. Snyder over that of a police officer, he responded that he would "weigh what [he] heard.").

jurors in terms of expressing any type of nervousness.[12]

Given the lack of record support for Brooks' claimed nervousness, the trial court's unexplained acceptance of the prosecutor's rationale provides no basis to find this reason credible. As noted by the dissent below: "Without the independent assessment from the trial court verifying the accuracy of the State's generalized and conclusory characterization, the record contains no objective support for the State's demeanor-based justification." *Snyder III*, *supra*, 942 So. 2d at 502 (Kimball, J., dissenting).[13]

Brooks purported anxiety about his teaching schedule: The issue at the heart of the State's second articulated reason was resolved as quickly as it was raised. Prior to the commencement of questioning in panels, Brooks approached the bench upon the court's request that any venire members with hardships present their reasons to the court. He explained that he was an education

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[12] Indeed, the only other time the issue of being nervous was discussed was when Gladys Coleman requested a hardship dismissal because she was diabetic and "gets so nervous a lot." R. 552.

[13] Given the trial court's mute acquiescence to the prosecutor's arguments – particularly on issues for which the record is otherwise silent, such as Brooks' supposed nervousness or Elaine Scott's alleged "enthusiasm" for a life sentence, *see infra* – it is difficult to justify the Louisiana Supreme Court and State's insistence that substantial deference be given to the trial court's rulings. The manner in which voir dire was conducted in this case stands in stark contrast to the proceedings this Court recently reviewed in *Uttecht v. Brown*, _ U.S. _, 2007 U.S. LEXIS 6965 (2007). There, although the Court emphasized (in habeas corpus proceedings brought under the AEDPA) the high deference applied to a trial court's rulings on cause challenges, it stressed "the careful and measured explanations" the judge had given for its rulings. *Id.* at 18. As this Court explained:

> The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment. But where, as here, there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful *voir dire*, the trial court has broad discretion.

Id. at *33. In contrast, "careful and measured explanations" for the trial court's rulings simply do not exist in this record. Moreover, as previously noted in Mr. Snyder's Petition, at 15, the Louisiana Supreme Court, in a case reversed on other grounds, chastised this same trial judge for the careless manner in which he considered the defendant's *Batson* challenges. *See State v. Jacobs*, 789 So. 2d 1280,1283, n.2 (La. 2001).

student at Southern University, had just begun his semester and was concerned because, if he sat on the jury, he might miss student teaching hours that were needed to graduate. R. 536. Brooks, however, informed the court that it could contact the dean of his school and inquire if it was possible for him to make up the observation hours and if it would be a problem with his graduation requirements. R. 536-37. After a short time period, during which the trial court addressed the requests of other venire persons, the judge's law clerk returned and reported her conversation with Dr. Tillman, the dean of Mr. Brooks' program. The law clerk stated that "Doctor Tillman at Southern University said that as long as it's just this week, he doesn't see that it would cause a problem with Mr. Brooks completing his observation time within this semester." R. 551. When the judge informed Brooks of this, he was satisfied and expressed no further concerns.[14] R. 551-52.

Following confirmation that jury duty would not affect Brooks' educational plans, neither Brooks, the prosecutor, nor defense counsel raised the issue again – at least not until the State moved to backstrike Brooks and was forced to respond to Mr. Snyder's *Batson* challenge. The State's failure to question Brooks concerning his student-teaching schedule reveals the prosecutor's ruse in proclaiming this a basis for his peremptory challenge. "Had Mr. Brooks's concern about his student teaching commitments genuinely mattered to the State, it would seem to reason that the State would have questioned him about it to determine the extent of his concern." *Snyder III*, *supra*, 942 So. 2d at 501 (Kimball, J., dissenting).

The pretextual nature of the prosecutor's proffered reason is further exposed by considering

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[14] According to the prosecutor, he expected the trial to "be over by Saturday." R. 545. In fact, the trial concluded on Friday, August 30, 1996. The State's speculative account of the possible impact of a lengthy trial on Brooks' ability to complete his student teaching obligations and graduate, *see* State's Brief at 8-9, simply manufactures additional justifications for the strike.

the prosecutor's lack of interest in the scheduling conflicts of several white prospective jurors accepted by the State. Arthur Yaeger, a white male, expressed concern with jury service because he had "a longstanding commitment to an event that's going to take place on Sunday that I've been an integral part of for many years." R. 983. Even given this long-time commitment, however, the prosecutor did not question Yaeger on it further and lodged no challenge against him. Rather, he was accepted by the State and sat on the jury.

Michael Sandras, a white male, reported that he taught at the University of New Orleans and had "just started yesterday and it's the beginning of the semester; so any prolonged absence, it becomes a real problem." R. 982. Sandras admitted that concern about his teaching obligations would cause him to have trouble concentrating and that he would "have to somehow pass on the information concerning work." *Id.* Despite Sandras' admissions, the State never asked him a single question about his commitments and the extent to which he would be distracted or want to avoid a penalty phase in order to "go home quickly." Despite all of this, the State found Sandras acceptable and made no challenge against him.[15]

The dissent in this case found the prosecutor's disinterest in the scheduling conflicts of white jurors highly relevant under *Miller-El II,* noting that the concerns of Brooks, Yaeger and Sandras "seem equally significant[,]" despite being discounted by the majority. *Snyder III, supra,* 942 So.

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[15] In addition, Kelly McMurray, a white female in the second panel, approached the bench with a hardship request, stating that she was a court reporting student at Franklin College, had just started a new job and had a two and a half year old daughter. R. 507. McMurray was actually explicit in stating that she could not be present for an extended trial: "I see no possible way for me, that I would be able to be sequestered. But I would like to be able to stay like on a one day jury trial." *Id.* The trial court denied McMurray's request to be excused. R. 508. Despite these clear issues that would prevent McMurray from concentrating on the trial and would make her more inclined to cut short her jury service by avoiding a penalty phase, the State did not ask a single question on this topic and did not challenge McMurray for cause. McMurray was subsequently struck for cause by the defense on the basis of her automatic death penalty views. R. 830.

2d at 504 (Kimball, J., dissenting). The dissent further observed:

> [I]n no instance did the State question Mr. Sandras or Mr. Yeager about their admitted concern regarding the time they would spend in court, and away from their personal activities, if selected to serve on the jury. . . . The factor that calls the State's strike of Mr. Brooks into question is the total lack of interest prosecutors exhibited in the admitted time concerns of Mr. Brooks, Mr. Sandras and Mr. Yaeger until it needed to justify with race-neutral reasons its strike of Mr. Brooks.

Id. at 504 (Kimball, J., dissenting).

Elaine Scott: The State used its sixth peremptory challenge to remove Elaine Scott, at which time the defense lodged a *Batson* objection. R. 902. The prosecutor responded:

> I observed she was very weak on her ability to consider the imposition of the death penalty. Her words, exactly – I wrote it down, that she thinks she could, and that's the reason for our challenge. . . . And she was very – my notes indicate she was very positive on when I said about a life sentence, she was very positive on her reason – her agreement that she could do that. It's for that reason –

R. 902. The defense countered that Scott "indicated she could consider both. . . . She also said she could consider the death penalty." R. 903. The court again overruled the *Batson* challenge, stating: "All right. I'm going to go ahead and allow the challenge." R. 903-04.

A review of the entire voir dire transcript reveals that these two reasons – being very weak on the death penalty and very positive on a life sentence – should not have been accepted and were simply pretexts for dismissing Scott because of her race.

Weak on the Death Penalty: The first question posed to Scott was whether she could consider imposing the death penalty if Mr. Snyder were found guilty of first degree murder. R. 851. In response, Scott replied affirmatively, "I think I could." R. 852.[16] The prosecutor immediately

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[16] In its brief, the State asserts that Scott's answer "must have been inaudible because before her reply was recorded or heard by the stenographer defense counsel interjected 'I'm sorry, I can't hear you.'" State's Brief, at 10 (citing R. 851). As the below portion of the transcript reflects, defense counsel, just as likely, was indicating her inability to hear the prosecutor's question:

proceeded onto the next prospective juror, Santosh Shah. Shah responded that he could not consider imposition of the death penalty, and the prosecutor engaged in further questioning to determine if Shah's inability to impose the death sentence was a steadfast conviction. R. 852. In fact, each time a prospective juror expressed reluctance about imposing the death penalty, the prosecutor would follow up with at least one question to determine the sincerity of this belief.[17] However, with respect to Scott, the prosecutor did not ask a single follow-up question concerning her ability to impose the death penalty.

It is quite revealing to compare the prosecutor's treatment of Scott with that of Mary Calligan, a white female, who answered that she was "not really sure" when asked if she could consider imposing the death penalty. R. 758. The State intensively questioned Calligan for over three pages of transcript. After this extended questioning, Calligan remained unclear on her position and the prosecutor moved on to another venire person. R. 761. However, the State persisted and

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The State: Ms. Scott, could you consider imposing the death penalty on Allen Snyder if you found him guilty of first degree murder?

The Defense: I'm sorry, I can't hear you?

Ms. Scott: I think I could.

R. 851-52. Certainly, at trial, the prosecutor did not indicate that Scott was soft-spoken, and "when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El II*, *supra*, 545 U.S., at 252.

[17] The prosecutor routinely sought to clarify the answers of white prospective jurors who indicated ambivalence about the death penalty, *see, e.g.*, R. 786-87 (prosecutor's follow-up questions to Karen Davis, who initially testified that she did not think she could impose a death sentence); R. 965-66 (prosecutor's follow-up questions to Anna Reber, who testified that she did not think she could make a sentencing decision either way); or who indicated that they could not impose it, *see e.g.*, R. 636, 752, 753, 754, 787, 849, 832, 921, 966.

returned to Calligan later in voir dire until she eventually stated that she could not consider imposing the death penalty. R. 798. The State successfully challenged her for cause on this basis. R. 829.

In contrast, when Scott, an African American, answered that she thought she could impose the death penalty, she was not asked a single follow-up question by the State; yet, she was struck because the prosecutor claimed she was "very weak" on the death penalty. The State's failure to conduct any meaningful voir dire of Scott with respect to her views on the death penalty, in stark contrast to Calligan, belies the State's argument that "very weak on the death penalty" was the true reason for its peremptory challenge.

Enthusiasm for a Life Sentence: The State's second reason is unsupported by the record. Absolutely nowhere in the voir dire transcript does it reflect what the prosecutor claimed his "notes reflect," i.e., that "she was very positive on when I said about a life sentence, she was very positive on her reason – Her agreement that she could do that." R. 902. In fact, when looking at the prosecutor's questions about jurors' ability to consider a life sentence, it appears not only that Scott was not "very positive" about a life sentence, but that the question she was answering was whether she could consider the death penalty – to which she responded in the affirmative:

The State: Ms. Alvarez, you said that you could not impose the death penalty. Ms. Goff?

Ms. Goff: I could consider the death penalty.

The Defense: I'm sorry, I couldn't hear.

The State: You could consider both?

Ms. Goff: Yes, I would consider it.

The State: Ms. DuBois?

Ms. DuBois: I could consider it, yes.

The State: Mr. Saracione?

Mr. Saracione: I could consider it.

The State: Mr. Saulino, sir?

Mr. Saulino: I could consider it.

The State: Ms. Scott.

Ms. Scott: I could.

R. 859-60.[18] Certainly responding "I could" to the question of whether she could consider the death penalty cannot possibly be interpreted as being "very positive" on a life sentence. The prosecutor's next and last question to Scott was whether she could hold the defense to its burden of proving insanity, to which she replied, she could. R. 866. Defense questioning only once touched upon a life sentence, and then only tangentially; in response to defense counsel's final question regarding Scott's ability to consider mitigating evidence, she hardly displayed enthusiasm for a life sentence:

Defense: Ms. Scott, can you consider mitigating circumstances, you know, a person's upbringing or the kind of life that he led prior to a certain incident in his life, can you consider that in deciding life versus death?

Ms. Scott: Right.

R. 895.

As in *Miller-El II*, the prosecutor "simply mischaracterized [Scott's] testimony," *Miller-El II*, *supra*, 545 U.S., at 244, representing that she enthusiastically endorsed a life sentence over the

[18] Prospective jurors DuBois and Saracione, both giving identical answers to Elaine Scott, were seated as jurors four and five. Saulino was also accepted by the State, but eventually removed by the defense with its fifth peremptory challenge.

death penalty, whereas she expressed no such preference. The prosecutor's proffered reason was thus no reason at all.

III.

The State fails to adequately address the issue raised in Questions Presented No. 2

The second question presented in Mr. Snyder's Petition asks whether the Louisiana Supreme Court erroneously imported into its review on direct appeal the standard of review this Court applied in the AEDPA habeas corpus decision in *Rice v. Collins*, 546 U.S. 333 (2006). The State quickly dispatches this issue, arguing:

> Footnote 6 of the opinion refutes this claim wherein the court noted that "...the standard of review in a federal habeas case is different from that on direct appeal. In the context of a direct review of a *Batson* issue, the trial court's decision on the ultimately question of discriminatory intent by the State is a finding of fact accorded great deference, which finding will not be overturned unless clearly erroneous." *Snyder*, 942 So. 2d at 489.

State's Brief, at 16. While the Louisiana Supreme Court majority opinion did correctly observe, in footnote 6, that the standards of review on direct appeal and in federal habeas corpus proceedings are different, it lost sight of this distinction during the course of its analysis of the *Batson* issues. Rather, the court appears to have to dismissed any idea that the standards of review, while articulated differently, are in actuality distinct. In ultimately concluding that Mr. Snyder could not prevail on his *Batson* claims, the majority turned to *Collins* for support:

> When we view the totality of the evidence discussed herein, as *Miller-El* directs, despite the lack of the trial court's active participation in voir dire and its failure to articulate particularized reasons for its determination that the State's proffered reasons were not pretextual, we find the trial court's decision to allow the strikes of Scott and Brooks was not clearly erroneous. Considering the evidence in the record before us, *a contrary conclusion would be an improper substitution of this court's evaluation for that of the trial court similar to that struck down in Collins*, __ U.S. __, 126 S. Ct. at 973. The record before us simply does not demonstrate that a

> reasonable factfinder *must necessarily conclude* the prosecutor lied about his reasons for striking Scott or Brooks.

Snyder III, *supra*, 942 So. 2d at 499 (emphasis supplied).[19]

As starkly illustrated by the analysis set forth in the Brief of *Amicus Curiae* Louisiana Association of Criminal Defense Lawyers,[20] even before the Louisiana Supreme Court decided *Snyder III*, it had erected an extraordinarily high barrier to appellate relief for claimed *Batson* errors. The *Snyder III* majority's interpretation of *Collins* renders that barrier essentially unassailable by adopting a standard of virtually absolute deference to the trial court, regardless of whether any rationale appears to support the trial court's rulings. *Cf. Uttecht*, *supra*, 2007 U.S. LEXIS 6965, at *33. If the majority's decision is allowed to stand, the promise of equal protection in jury selection will continue to elude the grasp of criminal defendants and minority jurors in Louisiana.[21]

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[19] The majority's conclusion that reversal on direct appeal is required only if the court "must necessarily conclude" that *Batson* was violated contravenes *Collins'* explanation that this standard applies only in federal habeas review under the AEDPA:

> Viewing the panel majority's concerns together, the most generous reading would suggest only that the trial court had reason to question the prosecutor's credibility regarding Juror 16's alleged improper demeanor. That does not, however, *compel the conclusion* that the trial court had *no permissible alternative* but to reject the prosecutor's race-neutral justifications and conclude Collins had shown a *Batson* violation. Reasonable minds reviewing the record might disagree about the prosecutor's credibility, *but on habeas review* that does not suffice to supersede the trial court's credibility determination.

Collins, *supra*, 546 U.S., at 341-42 (emphasis supplied).

[20] *See* Brief of *Amicus Curiae* Louisiana Association of Criminal Defense Lawyers, at 4-20. In light of *Batson*'s bleak history in Louisiana and the difficulties of enforcing the Equal Protection Clause in this context, *amicus* have suggested that this Court should revisit the viability of peremptory challenges. *See id.* at 2, 20. *See also Miller-El II*, *supra*, 545 U.S., at 266-74 (Breyer, J., concurring).

[21] Lower courts in Louisiana have already begun to follow the state supreme court's lead in this regard. As the Fifth Circuit Court of Appeal recently explained in denying relief under *Batson*:

> The Louisiana Supreme Court has found that *Miller-El* does not alter the standard of review for Batson claims on direct appeal. *State v. Elie*, 05-1569 (La. 7/10/06), 936 So. 2d 791,

IV.

The State's response to Question Presented No. 3 miscontrues the Louisiana Supreme Court's holding

In Question Presented No. 3, Mr. Snyder has asked this Court to review the Louisiana Supreme Court's holding that an ineffective assistance of counsel claim can never be predicated on trial counsel's failure to properly raise a *Batson* claim, on grounds that such error "does not prejudice the defendant to the extent that the trial was rendered unfair and the verdict suspect." *Snyder I*, *supra*, 750 So. 2d at 842. *See Snyder III*, *supra*, 942 So. 2d at 493 n.13 (citing *Snyder I*, 750 So.2d at 842) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). In response, the State suggests that Mr. Snyder has prematurely raised this claim because "Louisiana law is well settled that claims of ineffective assistance of counsel are most appropriately addressed in the post conviction application process rather than on an appellate record. . . . The posture of the case precludes adjudicating this claim herein. Relief cannot be based on this claim at this time." State's Brief, at 17-18.

The State's position that Mr. Snyder may raise his *Batson* claim via an ineffective assistance of counsel claim in post-conviction proceedings is wrong. The Louisiana Supreme Court did not

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796; *State v. Snyder*, *supra*. This is evidenced by the recent opinion in *Rice v. Collins*, 546 U.S. 333, 126 S. Ct. 969, 973-974, 163 L. Ed. 2d 824 (2006), in which the Supreme Court restated and employed the three-step *Batson* analysis.

State v. Edwards, _ So. 2d _, 2007 La. App. LEXIS 576 (La.App. 5 Cir. 03/27/07), at *24. *See also State v. Johnson*, _ So. 2d _, 2007 La. App. LEXIS 703 (La.App. 5 Cir. 4/11/07), at *12-13 ("*Miller-El* made it clear that *Batson*'s admonition to consider all relevant circumstances in addressing the question of discriminatory intent requires close scrutiny of the challenged strikes when compared with the treatment of prospective jurors who expressed similar views or shared similar background circumstances . . . . However, in *Collins*, the United States Supreme Court admonished reviewing courts from substituting their evaluation of the record for that of the trial judge.") (citing *State v. Elie*, 936 So. 2d 971, 976 (La. 2006)).

pretermit ruling on the ineffective assistance of counsel claim,[22] but instead addressed the merits and found them lacking. Under the Louisiana Supreme Court's holding, neither Mr. Snyder, nor any other Louisiana criminal defendant, may successfully prosecute an ineffective assistance claim predicated on *Batson* error. As set forth in Mr. Snyder's Petition for Writ of *Certiorari*, there is a split in authority regarding whether the failure to preserve *Batson* error can satisfy *Strickland*'s prejudice prong, and this issue is properly before this Court.

CONCLUSION

"[I]t is virtually impossible for a criminal defendant to succeed on review of a *Batson* claim under the standard as applied in Louisiana." Brief of *Amicus Curiae* Louisiana Association of Criminal Defense Lawyers, at 1-2. In this case, a majority of the Louisiana Supreme Court went out of its way to deny relief and to flout this Court's directive to reconsider Mr. Snyder's *Batson* claim in light of the careful analysis this Court performed in *Miller-El II*.[23]

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[22] The Louisiana Supreme Court routinely holds on direct appeal that claims of ineffective assistance of counsel should be pretermitted to post-conviction proceedings to "allow[] the 'district court in a proper case to order a full evidentiary hearing on the matter.'" *State v. Radcliff*, 416 So.2d 528, 530 (La. 1982) (citation omitted). *See, e.g., State v. Watson*, 817 So. 2d 81, 84 (La. 2002); *State v. Wessinger*, 736 So.2d 162, 195 (La. 1999); *State v. Hampton*, 750 So.2d 857, 877 (La. 1999). Indeed, in *Snyder I*, the Louisiana Supreme Court expressly held that, in the event Mr. Snyder was found to be competent upon remand, those ineffective assistance of counsel claims he had raised on appeal related to his competency be "relegated to post-conviction proceedings as the record does not contain sufficient evidence for this court to fully explore this issue." *Snyder I*, 750 So. 2d at 857.

[23] *See* Brief of *Amicus Curiae* Cornell Death Penalty Project in Support of Petitioner Allen Snyder, at 9-18.